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Before The

Federal Communications Commission

Washington, D.C. 20554

APR 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications Of

MOONBEAM, INC.

GARY E. WILLSON

For a Construction Permit for a
New FM Station on Channel
265A in Calistoga, California

) **Docket No. MM 93-42**

) File No. BPH-911115MG

) File No. BPH-911115MO

To: The Honorable Edward Luton
Administrative Law Judge

Motion to Enlarge

- To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. Pursuant to Section 1.229, motions to enlarge the issues in a comparative broadcast proceeding are to be filed by thirty ("30") days after the release of the Hearing Designation Order. Accordingly, this motion is timely filed.

Site Availability

4. In his November 15, 1991 Application (FCC Form 301) (File No. BPH-911115MO), Mr. Willson represented that he had reasonable assurance that "the site or structure proposed . . . as the location of [the applicant's] transmitting antenna, will be available to the applicant for the applicant's intended purpose" and that if he did not own the proposed site, he "obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure." Mr. Willson identified as the site owner's "agent" who he had contacted an individual named "Len Pringle." Willson Application at 24.

5. Moonbeam, Inc. has been informed by the owner of the site proposed by Mr. Willson, the Montesol Company, that Montesol has never given and does not intend to give Mr. Willson permission to construct a new tower or pole on the site proposed in his Application, and that such permission is required before Mr. Willson perform the necessary construction. Submitted herewith is the April 5, 1993

The Declaration references a letter dated March 6, 1992 from Mr. Livermore to Ms. Constant, a copy of which is attached as Exhibit A, which corroborates Mr. Livermore's current Declaration.

6. As set forth both in Willson's Application and the HDO (Willson Application, Engineering Statement, Exhibit E-1; FAA Form 7460-1; Exhibit E-4; HDO ¶2), Mr. Willson's proposal requires him to newly construct a tower for his antenna.

7. Clearly, Mr. Willson does *not* have reasonable assurance that the site proposed in his application will be available for his proposed transmitter and antenna, and did not have such assurance at the time his application was filed. The Application specifically states that, if the applicant does not own the site, assurance must be obtained from someone who does own or control the site. Even assuming *arguendo* that Mr. Pringle agreed to allow Mr. Willson to lease *and construct a tower upon* the site, Mr. Pringle's agreement was ineffective because Mr. Pringle lacked the requisite authority to grant such reasonable assurance. Directly on point is *Genesee Communications*, 3 FCC Rcd 3595 (Rev. Bd., June 7, 1988). In *Genesee*, the Review Board remanded a comparative proceeding for a hearing on a site availability issue based on the competing applicant's showing that, at best, applicant's assurance of site availability came from a party without authority. *Id.* See also *Port Huron Family Radio*, 4 FCC Rcd 2532 (Rev. Bd., March 23, 1989) (applicant's mistaken belief that he had reasonable assurance insufficient to cure site availability issue).

8. Without reasonable assurance of site availability, an issue against Mr. Willson respecting site availability is warranted, and examination of the matter in the context of a hearing is amply justified.

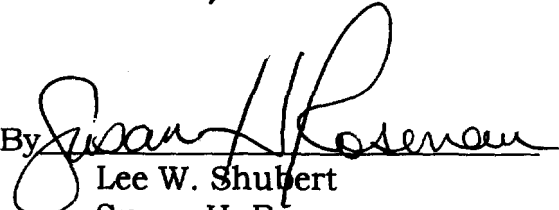
WHEREFORE, the premises considered, Moonbeam respectfully requests that the issues in the captioned proceeding be enlarged by the Presiding Administrative Law Judge, as to Gary Willson, to include the following:

To determine whether Gary Willson has reasonable assurance of the availability of the transmitter site specified in its application; and if not, the effect thereof upon its basic qualifications to be a Commission permittee/licensee.

Moonbeam further requests that, if the requested issue is added, that pursuant to Section 1.229 of the Commission's rules Gary Willson be ordered to provide the supplemental discovery set forth in Exhibit B hereto.

Respectfully submitted,

MOONBEAM, INC.

By 
Lee W. Shubert
Susan H. Rosenau

Its Attorneys

HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633

703/841-0606

April 7, 1993

**DECLARATION OF
PUTNAM LIVERMORE,
PARTNER, MONTESOL
COMPANY**

MONTESOL COMPANY

**414 Mason Street
San Francisco, Calif. 94102
Telephone (415) 392-2818**

April 5, 1993

Mary F. Constant, President
Moonbeam, Inc.
Shoot the Moon
Nicasio, CA 94946

Dear Ms. Constant:

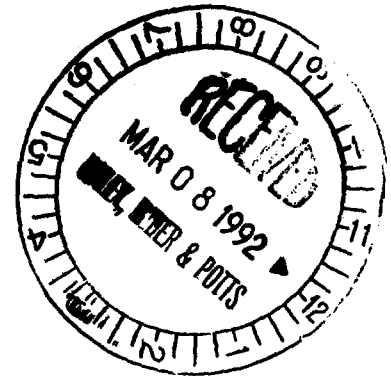
As I wrote to you on March 6, 1992, Montesol had not given authorization during the past year to any other party for a new FM station on our property at the summit of Mt. St. Helena.

Our property includes the parcels leased to Diablo

EXHIBIT A

MONTESOL COMPANY

414 Mason Street
San Francisco, Calif 94102
Telephone 392-2818



March 6, 1992

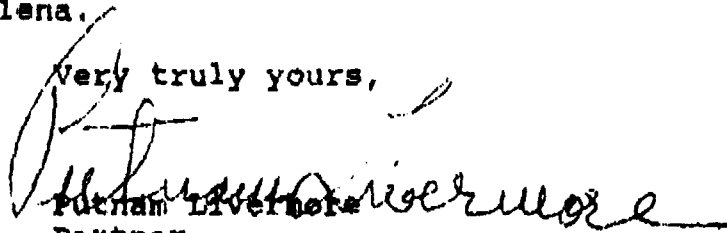
Mary F. Constant, President
Moonbeam, Inc.
Shoot The Moon
Nicasio, CA 94946

Dear Ms. Constant:

We are aware of the February 24, 1992 correspondence to you from Al Huber at KFTY. We believe that Montesol Company can reach satisfactory terms with KFTY and we approve of the concept of your proposed installation.

We have not given authorization, during the past year, to any other party for a new FM station on our property at the summit of Mt. St. Helena.

Very truly yours,


Putnam Livermore
Partner
Montesol

PL:js

EXHIBIT B

**Supplemental Discovery Requests
With Respect to Motion of
Moonbeam, Inc. To Enlarge**

I. Definitions

A. "Applicant" means Willson, as defined below, and his proposal (including his application, BPH-911115MO) to construct a new FM broadcast station on Channel 265 at Calistoga, California.

B. "Discussion documents" means notes, minutes or telephone toll records, and all other documents relating or referring to, or evidencing or reflecting, meetings, telephone conversations, or other oral communications relating or referring to, or evidencing or reflecting, the subject matter identified.

C. "Document" means each tangible thing, recording or reproduction, in any manner, any visual or auditory data in the Producing Parties' possession, control or custody, including without limitation correspondence, memoranda, transcripts, photographs, stenographic or handwritten notes, studies, evaluations, analyses, reports, reviews, working papers, books, charts, telegrams, pamphlets, pictures, video or audio tapes, voice recordings, computer tapes, printout or cards, microfilm or microfiches, and any papers on which words have been written, printed, typed or otherwise affixed, and shall mean a copy where the original is not in the possession, control or custody of a Producing Party and shall mean every copy of every document where such copy is not an identical copy of an original.

E. "Incorporation or acquisition documents" or "corporate documents" means articles of incorporation, certificates of incorporation, bylaws, partnership agreements, certificates of partnership, minutes, merger or purchase agreements, closing papers, stock certificates, stock subscriptions or

memoranda, notes, contracts, proposals, letters of intent, memoranda of understanding, files, forms, applications, ledgers, cancelled checks and journal entries relating to communications between Gary Willson and Montesol Company (including its principals, partners, officers, owners, agents, employees or attorneys) regarding Gary Willson's use of the site specified in his November 15, 1991 Application (File No. BPH-911115MO).

3. Copies of all documents, including, but not limited to, discussion documents, acquisition documents, personal documents, correspondence, memoranda, notes, contracts, proposals, letters of intent, files, forms, applications, memoranda of understanding, ledgers, cancelled checks and journal entries relating to communications between Gary Willson and KFTY (including its principals, partners, officers, owners, agents, employees or attorneys) regarding Gary Willson's use of the site specified in his November 15, 1991 Application (File No. BPH-911115MO).

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing Motion to Enlarge was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

A. Wray Fitch, III, Esquire
Gammon & Grange
8280 Greensboro Drive
McLean, VA 22102-3807

Administrative Law Judge Edward Luton
2000 L Street N.W.
Washington, D.C. 20036

Larry Miller, Esquire*
Federal Communications Commission
Mass Media Bureau, Hearing Branch
Suite 7212
2025 M Street N.W.
Washington, D.C. 20554

A handwritten signature in cursive script, appearing to read "Tracy J. Santag", is written over a horizontal line.

April 7, 1993